Supreme Court, U. S.
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In the Supreme Court
of the United States

OCTOBER TERM, 1975

No. 75-7031

ARTHUR OTTO BOWMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

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Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-styled case on October 14, 1975.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit, not published, is set out in the Appendix, infra at A1-A5. The District Court, sitting as the trier of fact entered Judgment against Petitioner and a copy of the findings of fact and conclusions

of law is included in the Appendix, infra at A6-A13, and the Judgment of the Court is included in the Appendix, infra at A14-A15.

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 14, 1975. The Court has jurisdiction under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether Rule 404(b), of the Rules of Federal Evidence as applied to this case violates constitutional due process under the Fifth Amendment by allowing the introduction into evidence of prior and subsequent alleged wrongful acts for which the Defendant has neither been charged nor convicted, thereby weakening the burden of the Government to prove its case beyond a reasonable doubt.

2. Whether due process is further violated by the introduction of evidence of such prior and subsequent alleged wrongful acts for which there has been no conviction, by shifting the burden of proof to the Defendant requiring him to rebut not only the crime charged, but also the uncharged alleged wrongful or criminal acts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law."

Rule 404(b) of the Federal Rules of Evidence, public Law 93-595 states:

> "Other Crimes, Wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

STATEMENT OF THE CASE

The Petitioner was indicted on five counts of mail fraud in violation of Title 18 United States Code 1341, which is set forth in the Appendix, infra A16 to A23. At Trial', the Government introduced evidence that Petitioner, in 1971, using another name, married another woman in Richmond, Virginia, depleted her funds and abandoned her; that in 1972, he appeared in Portland, Oregon and married his present Wife who owned an antique store and used the business to establish his credit with the Complainant, Amiton and secured jewelry on approval, some of which he sold for a loss and for which he did not pay; that he disappeared from Portland, Oregon on October, 1973, after reducing his Wife's assets; that he thereafter in November, 1973, using another name met and proposed marriage to another woman in Fort Lauderdale, Florida and four days after securing a license to marry left her after taking approximately $2,000.00 of her money.

No indictment was returned or charges made or Trial had of the alleged crimes in Richmond, Virginia and Fort Lauderdale, Florida.[1]

REASON FOR GRANTING THE WRIT

Neither the Court of Appeals in this case nor the Supreme Court of the United States has determined in any case the effect upon the requirement that the State prove the guilt of a Defendant beyond a reasonable doubt, the introduction of evidence of other crimes or wrongful acts with which the Defendant has not been charged or convicted. Nor has the Court considered the question of violation of due process by shifting the burden of proof in such cases.

Rule 404 (b) of the Federal Rules of Evidence is a codification of case law on the subject of admissibility of evidence of other crimes, wrongs or acts. Nowhere in the legislative history of the act; nowhere in the case law of the United States Supreme Court; nowhere in the learned treatises on the subject by McCormick, Wigmore and Weinstein is there any discussion of the apparent weakening of the burden on the State to prove its case beyond a reasonable doubt by allowing the introduction into evidence of other uncharged crimes, wrongs or acts. That proof beyond a reasonable doubt in a criminal case is constitutionally required is well established.

In re WINSHIP, 397 U.S. 358, 25 L.Ed.2d 368, 90 S. Ct. 1068 (1970).

This Court has held that shifting the burden of

[1] Facts are as stated in the findings of fact of the Trial Judge, Appendix, infra at A6-A13.

proof to a Defendant in a criminal case violates due process. *MULLANEY* v. *WILBUR*, 95 S. Ct. 1881 (1975). However, the concept has not been ruled upon by this Court in cases involving introductions of evidence of other uncharged crimes, wrongs or acts.

Rule 404 (b) and the case law on the subject need to be clarified in order that the due process issues raised herein may be resolved, particularly, as in the instant case, the Court of Appeals gave no rational for its decision on the questions of due process.

CONCLUSION

For the foregoing reason, the Petition for Certiorari should be granted.

Respectfully submitted,

NICK CHAIVOE
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
vs.	)	No. 75-1322
	)	MEMORANDUM
ARTHUR OTTO BOWMAN, *Defendant-Appellant.*	)	

[October 14, 1975]

Appeal from the United States District Court
for the District of Oregon

Before: TRASK and SNEED, Circuit Judges and PLUMMER,* District Judge.

Appellant Arthur Bowman (hereinafter Bowman) was convicted of five counts of mail fraud in violation of 18 USCA §1341, after a trial by judge sitting without a jury, in the United States District Court for the District of Oregon.

Bowman asserts as errors, (1) the admission of certain prior and subsequent acts or conduct, (2) that the admission of such evidence violated due process, (3) that the evidence was insufficient to sustain his conviction, and (4) that he was denied the effective assistance of counsel at trial.

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* Raymond E. Plummer, Senior United States District Judge, District of Alaska, sitting by designation.

An essential element of mail fraud under 18 USCA 1341, with which Bowman was charged in each of the five counts of the indictment, is the existence of a scheme or artifice to defraud. This element necessarily required the intent to carry the scheme or artifice into effect. Accordingly to establish its case it was neces sary for the government to prove beyond a reasonable doubt that Bowman acted with such intent as to each count charged.

To establish this proof, the government presented evidence of prior and subsequent acts and conduct of a similar or like nature by Bowman. He complains that none of such acts involved the use of the mail and that the admission of such evidence was for that reason, error.

It may be stated generally that when a defendant is being tried for a specific offense, evidence of an offense different or unrelated to that charged in the indictment is impermissible. However, the exceptions to this rule are so numerous that it is difficult to determine which is the more inclusive, the rule or the acknowledged exceptions. *Fineberg* v. *United States*, 393 F.2d 417, (9th Cir. 1968); *Davis* v. *United States*, 370 F.2d 310, (9th Cir. 1966).

The law is well settled that prior or subsequent acts or conduct whether they portray criminality or not, when similar or of a like nature to the subject matter forming the basis of the indictment are probative to negate that the crucial conduct was unintentional, innocent, inadvertent, or the product of a mistake.

The rule is well established in this Circuit that evidence of other acts or conduct of a like or similar nature will not be admitted to prove a character of a person in order to show that he acted in conformity therewith. However, such evidence is admitted for other purposes such as proof of motive, opportunity, intent, plan, scheme, knowledge, *modus operandi*, or absence of mistake or accident. *United States v. Nunez*, 483 F.2d 453 (9th Cir. 1973) *cert. denied* 414 U.S. 1076; *United States v. Pitman*, 475 F.2d 1335 (9th Cir. 1973), *cert. denied* 414 U.S. 873.

While it is true that 18 USCA 1341 requires use of the mails before a conviction can be obtained, it also relates to frauds and swindles. A scheme or artifice to defraud may include any plan or course of action intended to deceive others, and to obtain by false or fraudulent pretenses, representations, or promises, money or property from persons so deceived. The common and general understanding of the word "swindle" is to obtain money or property from another by fraud or deceit; to cheat or defraud.

While 18 USCA 1341 proscribes the use of the mail in perpetrating frauds and swindles, it does not purport to establish that frauds and swindles can be perpetrated only in that manner. As a matter of fact, the maner and different ways that frauds and swindles may be perpetrated are limited only by the ingenuity and cunning of the instigator of the scheme.

The law does not require the prior or subsequent act or conduct to be identical to that charged in the indictment. It requires only that it be of a similar or like nature and that it not be too remotely related in point of time.

The following cases involving frauds, false pretenses, swindles and deceit have applied this standard or rule. *United States v. Castro*, 476 F.2d 750 (9th Cir. 1973); *United States v. Jones*, 425 F.2d 1048 (9th Cir. 1970), *cert. denied*, 393 U.S. 1097; *United States v. Frick*, 490 F.2d 666 (5th Cir. 1973); *Fineberg v. United States*, 393 F.2d 417 (9th Cir. 1968); *Suhl v. United States*, 390 F.2d 547 (9th Cir. 1968) *cert. denied*, 391 U.S. 964; *Nye & Nissen v. United States*, 168 F.2d 846 (9th Cir. 1949); *aff'd* 336 U.S. 613.

From our review and consideration of the record as a whole, we conclude that the prior and subsequent acts and conduct which are the basis of Bowman's claim of error, are a classic example of a continuing chain of like or similar frauds and swindles and were properly admitted by the trial judge as bearing on Bowman's intent, motive, scheme, plan, and *modus operandi* at the time he committed the acts charged in the indictment.

As in most questions regarding the admissibility of evidence, trial judges are given wide discretion in balancing the probative value of evidence of this nature against its possible prejudicial effect. In this case it was crucial to the government's case to estab-

lish the requisite intent. The evidence submitted was highly relevant to this issue. In *United States v. Mahler*, 452 F.2d 547 (9th Cir. 1957), this Court stated: "Appellant's complaint is that the relevance is so slight and the potential effect is so great that the evidence should have been excluded. We likewise agree with appellant that the evidence was prejudicial. The best evidence often is."

After careful consideration, we conclude that the action of the trial judge was proper and that there was no violation of Bowman's right to due process of law.

In determining the sufficiency of the evidence to sustain a conviction, the evidence must be construed in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60 (1942); *United States v. Leal*, 509 F.2d 122 (9th Cir. 1975); *United States v. Nelson*, 419 F.2d 1237 (9th Cir. 1969). Further this court must be satisfied that the finder of the facts reasonably could decide from all the evidence that he would not hesitate to act in his own serious affairs upon factual assumptions as probable as the conclusion that the defendant is guilty as charged. *United States v. Felix*, 474 F.2d 610 (9th Cir. 1973); *United States v. Nelson, supra*, 419 F.2d at 1245.

Applying this standard of review to the case before us, we find there is substantial evidence sufficient to sustain the conviction.

The judgment is affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)	No. CR 74-44
	)	FINDINGS
v.	)	OF FACT
	)	AND
ARTHUR OTTO BOWMAN,	)	CONCLUSIONS
Defendant.	)	OF LAW

On November 8, 1974, and November 25, 1974, trial was held before this Court, sitting without a jury, of the above-captioned case. The defendant, Arthur Otto Bowman, was charged in a five-count Indictment with Mail Fraud in violation of Title 18, United States Code, Section 1341. Testimony was presented on behalf of the Government and the defendant, and the defendant testified on his own behalf. Physical evidence was offered on behalf of both parties and received by this Court. Based upon all the evidence, I make the following

FINDINGS OF FACT

1. That in 1971 the defendant, Arthur Otto Bowman, using the alias Steve Mitchell, did meet and marry Edna Mitchell, in Richmond, Virginia. In December 1972 the defendant left Richmond, without informing his wife that he intended to abandon her, and left behind substantial debts after reducing the assets of Edna Mitchell and converting the same to his own use and purpose.

2. That in 1972 the defendant, using the name Arthur Otto Bowman, appeared in Portland, Oregon, where he met and married Maureen Riback Bowman, the sole proprietor of a small antique store known as Fabian's Antiques. At the time of the marriage, Mrs. Bowman possessed the following assets: $15,000 of insurance proceeds; in excess of $8,000 in a trust account at the United States National Bank; her own home in Northeast Portland; and her store, Fabian's Antiques.

3. That the defendant entered the marriage to Mrs. Bowman under questionable circumstances considering his prior marriage to Mrs. Mitchell, and with the intent and purpose to convert and use Mrs. Bowman's assets for his own purpose and gain.

4. That the defendant did in fact enter the business of Fabian's Antiques.

5. That the defendant first requested jewelry from Amiton Jewelry Company, New York, New York, hereinafter noted as Amiton, by telephone on April 11, 1974, which jewelry was mailed to the defendant by registered mail.

6. That thereafter on May 23, July 26, August 6, August 16, August 24, and August 28, 1973, the defendant requested respectively 1, 4, 3, 3, 1, and 3 pieces of jewelry by telephone from Amiton, which jewelry was shipped to the defendant by registered mail on the days of the request and which jewelry was either purchased by the defendant from Amiton or returned by him to them.

7. That the defendant's intent and purpose in requesting this jewelry was to establish a course of business with Amiton which would cause them to rely on his integrity by submitting payment promptly or returning the item and Amiton did in fact rely upon his integrity.

8. That on or about September 10, 1973, the defendant did request two pieces of jewelry with a combined value of $8,710 by telephone from Amiton, which jewelry was mailed to the defendant by registered mail, Registered Article No. 527481, via the United States Postal Service who delivered the jewelry to the defendant, according to the direction A. Bowman, 13865 N.W. Cornell Road, Portland, Oregon, which was ascribed thereon, on or about September 12, 1973.

9. That in payment therefore, the defendant by mail submitted a check in the amount of $8,710 postdated October 9, 1973.

10. That at the time of submission of the check the defendant intended that it not be honored and that the check was submitted for the sole purpose of defrauding Amiton by deluding them into the belief that the check would be honored and, in the meantime, the defendant could continue to request and receive jewelry from Amiton for which he would not pay.

11. That the defendant further relied on the fact that the check when deposited by Amiton in its bank would not reach his bank by mail until such time as he had departed Portland.

12. That on or about the same time the defendant by ruse obtained a copy of Lawrence Whalen's driver's license, a copy of his birth certificate, and his Social Security number with the intent and purpose of assuming the identity of Lawrence Whalen when he departed Portland, which in fact the defendant did.

13. That on September 12, 1973, the defendant sold a ring valued at $8,500, which ring was one of the items of jewelry mentioned in paragraph 8, *supra*, to Stevens and Sons, Portland, Oregon, for $8,000, a loss of $500.

14. That on or about October 1, 1973, the defendant did request, *inter alia*, four pieces of jewelry with a combined value of $9,600 by telephone from Amiton, which jewelry was mailed to the defendant by registered mail in two separate containers, two pieces of jewelry with a combined value of $4,250, Registered Article No. 527223, and two pieces of jewelry with a combined value of $5,300, Registered Article No. 527224, via the United States Postal Service who delivered the jewelry to the defendant, according to the direction A. Bowman, 13865 N.W. Cornell Road, Portland, Oregon, which was ascribed thereon, on or about October 4, 1973.

15. That in payment for the jewelry valued at $4,250, the defendant by mail submitted a check in the amount of $4,250 postdated October 17, 1973.

16. That at the time of submission of the check the defendant intended that it not be honored and that the check was submitted for the sole purpose of

defrauding Amiton by deluding them into the belief that the check would be honored and, in the meantime, the defendant could continue to request and receive jewelry from Amiton for which he would not pay.

17. That the defendant further relied on the fact that the check when deposited by Amiton in its bank would not reach his bank by mail until such time as he had departed Portland.

18. That on October 5, 1973, the defendant sold the jewelry valued at $4,250, which jewelry was mentioned in paragraph 14, *supra*, to H & B Loan Company, Portland, Oregon, hereinafter noted as H & B, for $3,700, a loss of $550.

19. That the defendant at no time intended to pay for the jewelry valued at $5,300 received as Registered Article No. 527224 and one of the items, valued at $850, was sold to H & B at a loss, as further set forth in paragraph 21, *infra*.

20. That on or about October 9, 1973, the defendant did request four pieces of jewelry with a combined value of $4,795 by telephone from Amiton, which jewelry was mailed to the defendant by registered mail, Registered Article No. 527153 via the United States Postal Service who delivered the jewelry to the defendant, according to the direction A. Bowman, 13865 N.W. Cornell Road, Portland, Oregon, which was ascribed thereon, on or about October 11, 1973.

21. That the defendant at no time intended to pay

for the jewelry mentioned in paragraph 20, *supra*, and that these four items, in combination with another item valued at $850 as mentioned in paragraph 19, *supra*, were sold to H & B on October 13, 1973, for $4,100, a loss of $1,545.

22. That the defendant relied on his prior dealings with Amiton, including the submission of postdated checks, to deceive Amito that payment would be submitted by mail or was submitted by mail but had not yet been received by Amiton.

23. That on or about October 11, 1973, the defendant did request eight pieces of jewelry with a combined value of $7,025 by telephone from Amiton, which jewelry was mailed to the defendant by registered mail, Registered Article No. 527583 via the United States Postal Service who delivered the jewelry to Wilma Moore, who delivered it to the defendant, according to the direction A. Bowman, 13865 N.W. Cornell Road, Portland, Oregon, which was ascribed thereon, on or about October 13, 1973.

24. That the defendant at no time intended to pay for the jewelry mentioned in paragraph 23, *supra*, and that one of the seven pieces of jewelry, a ring valued at $1,500, was sold to H & B on October 16, 1973, for $1,000, a loss of $500.

25. That at the time the defendant departed from Portland, both his personal bank account and his business bank account were overdrawn.

27. That at the time the defendant departed from

Portland, Maureen Bowman's assets had been significantly reduced as she was left with a minimal amount of cash, an inventory of some calculators for which a $29,000 debt was owing, an inventory of some antiques and property which had been purchased by Mrs. Bowman with a house.

28. That the defendant's stated purpose for leaving Portland was found by this Court not to be credible but this Court finds that the defendant specifically intended to defraud Mrs. Bowman and others in the community, as well as to defraud by use of the mails Amiton.

29. That even if this Court had accepted the defendant's version of what occurred, the defendant committed a fraud by use of the mails as regards Amiton since the defendant at no time intended to pay for the pieces of jewelry received from Amiton and utilized a scheme to defraud by use of the mails and to thereby avoid detection.

30. That in November 1973 the defendant using the alias Lawrence Whalen, did meet and propose marriage to Helene Parker, a resident of Fort Lauderdale, Florida. In January 1974 without the benefit of a divorce from Mrs. Bowman the defendant did obtain a license to marry Helene Parker. That four days thereafter, the defendant left Helene Parker, without informing her that he intended to abandon her, after defrauding her of approximately $2,000.

31. That in April 1974 the defendant was arrested in New Orleans, Louisiana, and after having been

fully advised of his rights, admitted disposing of the jewelry in Miami, Florida, and having obtained the jewelry by postdating checks.

Based upon these findings of fact, I make the following

CONCLUSIONS OF LAW

1. That the defendant, Arthur Otto Bowman, also known as Steve Mitchell, also known as Otto Arthur Goldman, beyond a reasonable doubt did devise a scheme to defraud Amiton Jewelry Company as set forth in the indictment which is incorporated herein by reference.

2. That beyond a reasonable doubt the use of the mails of the United States Postal Service was an integral part in the execution of said scheme to defraud.

3. That the defendant, Arthur Otto Bowman, also known as Steve Mitchell, also known as Otto Arthur Goldman, beyond a reasonable doubt is guilty of Counts I, II, III, IV and V as charged and set forth in the indictment, incorporated herein, each of which counts is a violation of Title 18, United States Code, Section 1341.

ROBERT C. BELLONI
Chief Judge, U.S. District Court

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF OREGON

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 74-44
	)	CRIMINAL
ARTHUR OTTO BOWMAN	)	

On this 21st day of January, 1975 came the attorney for the government and the defendant appeared in person and[1] by retained counsel Nick Chaivoe.

IT IS ADJUDGED that the defendant has been convicted upon his plea of[2] not guilty and a finding by the Court of GUILTY of the offense of mail fraud, in violation of 18 U.S.C. 1341, as charged in counts 1, 2, 3, 4, and 5 of the indictment of 5 counts as charged[3]

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[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number ....." if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrntly or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defedant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5] Enter any order with respect to suspension and probation. [6] For use of Court wishing to recommend a particular institution.

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] five (5) years on count 1; five (5) years on count 2; five (5) years on count 3; five (5) years on count 4; and five (5) years on count 5. Count 2 shall run consecutively with count 1 and counts 3, 4, and 5 shall run concurrently with count 1, making a total term of imprisonment ten (10) years. The defendant shall become eligible for parole at such time as the Board of Parole shall determine, 18 U.S.C. 4208(a)(2).

IT IS ADJUDGED that[5]

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified officer and that the copy serve as the commitment of the defendant.

ROBERT C. BELLONI
United States District Judge
ROBERT M. CHRIST, Clerk
By *D. E. Marsh*, Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)	
	)	
v.	)	No. CR 74-44
	)	INDICTMENT
ARTHUR OTTO BOWMAN, also known	)	[18 U.S.C.
as Steve Mitchell, also known	)	1341]
as Otto Arthur Goldman,	)	
Defendant.	)	

THE GRAND JURY CHARGES:

COUNT 1

Beginning on or about September, 1972, and continuing to the date of this indictment, ARTHUR OTTO BOWMAN, also known as Steve Mitchell, also known as Otto Arthur Goldman, defendant herein, devised and intended to devise a scheme and artifice to defraud and to obtain property, that is jewelry and semi-precious and precious stones, including, but not limited to, diamonds, emeralds, and opals, from Amiton Jewelry Company, a New York company, wherein it was part of said scheme and artifice to defraud that Amiton Jewelry Company was induced by the defendant, ARTHUR OTTO BOWMAN, also known as Steve Mitchell, also known as Otto Arthur Goldman, to send the aforementioned property to him, in Portland, Oregon, by mail from New York, well knowing at the time the aforementioned property would be unlawfully converted to his own use and benefit by

means of the scheme and artifice to defraud, which scheme and artifice to defraud so devised and intended to be devised by the said defendant, was in substance as follows:

1. It was part of the scheme and artifice to defraud and to obtain the aforementioned property that the defendant did marry the proprietor of an antique business known as Fabians Antiques, which business he thereafter did operate and control, thereby securing the credit, good will, and reputation of an established business.

2. It was further part of the scheme and artifice to defraud and to obtain the aforementioned property that on or about April 11, 1973, he commenced doing business with Amiton Jewelry Company by calling said company and offering to buy on memorandum jewelry valued at approximately three thousand five hundred dollars ($3,500.00), well knowing that the said company could be induced to furnish the jewelry without payment in advance and well knowing that the said company could be lulled into relying on the defendant by referring to the United States National Bank, North Beaverton Branch, which would produce a favorable report on the business of Fabians Antiques.

3. It was further part of the scheme and artifice to defraud and to obtain the aforementioned property that the defendant would continue to order property from Amiton Jewelry Company without advance pay-

ment and would thereafter either return the property or purchase the property, thereby establishing his reputation and credit further with said company and lulling said company into relying upon this reputation of compliance with his obligations.

4. It was further part of the scheme and artifice to defraud and to obtain the aforementioned property that commencing on or about September 10, 1973, through October 17, 1973, the defendant would and did order substantial amounts of the aforementioned property of a value of approximately thirty thousand one hundred thirty dollars ($30,130.00) which property was to be and was converted to the use and benefit of the defendant without payment to Amiton Jewelry Company which company owned the property.

5. It was further part of the scheme and artifice to defraud and to obtain the aforementioned property that on or about September 10, 1973, the defendant by telephone call offered to purchase approximately eight thousand seven hundred ten dollars' ($8,710,00) worth of jewelry from Amiton Jewelry Company and after receipt of said jewelry the defendant sent to said company by mail a check, which was received by them on or about October 3, 1973, in the amount of eight thousand seven hundred ten dollars ($8,710.00) drawn upon the account of Fabians Antiques and Imports, knowing full well that there existed insufficient funds for said check, and postdating the check October 9 and October 13, 1973, which actions were for the purpose of presenting a facade of compliance in order

to lull said company into inaction and prolonging the period of time in which the defendant could continue his scheme and artifice to defraud.

6. It was further part of the scheme and artifice to defraud and to obtain the aforementioned property that sometime prior to October 2, 1973, the defendant by telephone call offered to purchase approximately four thousand two hundred fifty dollars' ($4,250.00) worth of jewelry from Amiton Jewelry Company and after receipt of said jewelry the defendant sent to said company by mail a check, which was received by them sometime prior to October 17, 1973, in the amount of four thousand two hundred fifty dollars ($4,250.00) drawn upon the account of Fabians Antiques and Imports, postdated October 17, 1973, and requesting that it not be deposited before October 17, knowning full well that on that date there would be insufficient funds for said check, which actions were for the purpose of presenting a facade of compliance in order to lull said company into inaction and prolonging the period of time in which the defendant could continue his scheme and artifice to defraud.

7. It was further part of the scheme and artifice to defraud and to obtain the aforementioned property that sometime prior to the separate dates of October 2, 1973, October 9, 1973, and October 11, 1973, the defendant by telephone calls on three (3) separate occasions offered to purchase approximately five thousand three hundred fifty dollars' ($5,350.00), approximately four thousand seven hundred ninety-five dol-

lars' ($4,795.00), and approximately seven thousand twenty-five dollars' ($7,025.00) worth of jewelry respectively, knowning full well that no payment would be made for such property and none of the property would be returned but in fact would be and was converted to his own use and benefit.

8. It was further part of the scheme and artifice to defraud and to obtain the aforementioned property that the property obtained would be and was either maintained by the defendant or was sold by the defendant, and that the sale of the property was done between the period September 12, 1973 to October 17, 1973, and that the defendant (left town on October 17, 1973, which prevented the recovery of either the property obtained or the money received from the sale thereof.)

9. On or about September 12, 1973, at Portland, Oregon, in the District of Oregon, ARTHUR OTTO BOWMAN, also known as Steve Mitchell, also known as Otto Arthur Goldman, defendant herein, for the purpose of executing the aforesaid scheme and artifice and attempting to do so did knowningly and wilfully cause to be delivered by United States Postal mail, according to the direction thereon, Registered Article No. 527481, mailed to A. Bowman, 13865 N.W. Cornell Rd., Portland, Oregon, mailed by Amiton Jewelry Company, New York, New York, postmarked September 10, 1973, at New York, New York.

COUNT II

1. The Grand Jury realleges all of the allegations of Count I of this indictment with the exception of those contained in the last paragraph thereof.

2. On or about October 4, 1973, at Portland, Oregon, in the District of Oregon, ARTHUR OTTO BOWMAN, also known as Steve Mitchell, also known as Otto Arthur Goldman, defendant herein, for the purpose of executing the aforesaid scheme and artifice and attempting to do so did knowingly and wilfully cause to be delivered by United States Postal Service mail, according to the direction thereon, Registered Article No. 527223, mailed to A. Bowman, 13865 N.W. Cornell Rd., Portland, Oregon, mailed by Amiton Jewelry Company, New York, New York, postmarked October 2, 1973, at New York, New York.

COUNT III

1. The Grand Jury reallegs all of the allegations of Count I of this indictment with the exception of those contained in the last paragraph thereof.

2. On or about October 4, 1973, at Portland, Oregon, in the District of Oregon, ARTHUR OTTO BOWMAN, also known as Steve Mitchell, also known as Otto Arthur Goldman, defendant herein, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, did knowingly and wilfully cause to be delivered by United States Postal Service mail, according to the direction thereon, Registered

Article No. 527224, mailed to A. Bowman, 13865 N.W. Cornell Rd., Portland, Oregon, mailed by Amiton Jewelry Company, New York, New York, postmarked October 2, 1973, at New York, New York.

COUNT IV

1. The Grand Jury realleges all of the allegations of Count 1 of this indictment with the exception of those contained in the last paragraph thereof.

2. On or about October 11, 1973, at Portland, Oregon, in the District of Oregon, ARTHUR OTTO BOWMAN, also known as Steve Mitchell, also known as Otto Arthur Goldman, defendant herein, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, did knowingly and wilfully cause to be delivered by United States Postal Service mail, according to the direction thereon, Registered Article No. 527153, mailed to A. Bowman, 13865 N. W. Cornell Rd., Portland, Oregon, mailed by Amiton Jewelry Company, New York, New York, postmarked October 9, 1973, New York, New York.

COUNT V

1. The Grand Jury realleges all of the allegations of Count I of this indictment with the exception of those contained in the last paragraph thereof.

2. On or about October 13, 1973, at Portland, Oregon, in the District of Oregon, ARTHUR BOWMAN, also known as Steve Mitchell, also known as Otto Ar-

thur Goldman, defendant herein, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, did knowingly and wilfully cause to be delivered by the United States Postal Service mail, according to the direction thereon, Registered Article No. 527583, mailed to A. Bowman, 13865 N. W. Cornell Rd., Portland, Oregon, mailed by Amiton Jewelry Company, New York, New York, postmarked October 11, 1973, at New York, New York;

All in violation of Title 18, United States Code, Section 1341.

Dated this 28th day of February, 1974.

A TRUE BILL

Etiole Curry
/s/ ETIOLE CURRY
Foreman

John S. Ransom
/s/ JOHN S. RANSOM

FILED
JAN 19 1976
MICHAEL RODAK, JR., CLERK

No. 75-703

In the Supreme Court of the United States

OCTOBER TERM, 1975

ARTHUR OTTO BOWMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-703

ARTHUR OTTO BOWMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that Rule 404(b) of the Federal Rules of Evidence, which permits the admission in evidence of the fact of the accused's commission of other crimes, wrongs or acts, where such evidence is relevant to an issue such as motive or intent, violates the Due Process Clause of the Fifth Amendment.

Following a jury-waived trial in the United States District Court for the District of Oregon, petitioner was convicted on five counts of mail fraud, in violation of 18 U.S.C. 1341 (Pet. App. A6-A13). He was sentenced to two consecutive terms of five years' imprisonment, with the five-year sentences on each of the other three counts to run concurrently with the sentence on count 1 (Pet. App. A14-A15). The court of appeals affirmed (Pet. App. A1-A5).

1. The evidence is set forth in detail in the district court's findings of fact (Pet. App. A6-A13). Briefly, in mid-1972, petitioner arrived in Portland, Oregon, where he met Marguerite Maureen Riback (Tr. 172). Shortly thereafter they married (Tr. 173), and petitioner became active in the operation of his wife's business, Fabian's Antiques (Tr. 225). In April of 1973, petitioner began ordering jewelry for Fabian's Antiques from the Amiton Jewelry Company of New York (Tr. 9-10). From April until August of 1973, petitioner ordered numerous pieces of jewelry, which he either paid for or promptly returned (Tr. 11-16).[1]

In September and October of 1973, petitioner made four telephonic requests of Amiton, which resulted in the mailing of five packages of jewelry. These mailings formed the basis for the five counts of mail fraud on which petitioner was convicted. In each case, the items of jewelry were either not paid for or paid for with a post-dated check which was subsequently returned for lack of funds. Petitioner sold the jewelry at a loss and left Oregon without informing his wife of his departure (Tr. 16-28, 62-67, 71-75, 129-136, 181, 220).[2] The business checking account was overdrawn when petitioner left Portland (Tr. 230-231).

When petitioner was arrested in New Orleans, he possessed identification in the name of Lawrence Whalen

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[1]The district court concluded that petitioner's "intent and purpose in requesting this jewelry was to establish a course of business with Amiton which would cause them to rely on his integrity" (Pet. App. A8).

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[2]In an attempt to find out what happened to petitioner, Mrs. Bowman hired Pinkerton detectives to investigate his disappearance (Tr. 221).

(Tr. 109-110, 133) and initially denied ever having been in Oregon (Tr. 131). The next day, however, he acknowledged that he had been in Portland, and admitted obtaining the jewelry by "postdat[ing] the checks" (Tr. 135-136).

At trial, petitioner testified that he did not intend to defraud Amiton. He explained that he had left sufficient assests to cover his debts and that his sudden departure was caused by fear that the Mafia would kill him because he previously had been a government informer and had been recognized by a Mafia figure just before leaving Portland (Tr. 145-149, 157-158, 174).

2. The evidence of other crimes about which petitioner complains consisted of testimony from Edna Mitchell and Helene Parker. Edna Mitchell testified that she met petitioner in February or March of 1971, and they were wed on June 10, 1971, in Richmond, Virginia. On December 23, 1971, petitioner left Richmond after telling Mrs. Mitchell that he was going out of town on business. She neither saw him again, nor heard from him until trial. Petitioner's departure occurred after he had obtained approximately ten thousand dollars from Mrs. Mitchell; he left behind business debts of between ten and fifteen thousand dollars (Tr. 112-117).

Helene Parker testified that she met petitioner, then using the alias of Lawrence Whalen, in November of 1973, in Fort Lauderdale, Florida. Petitioner proposed marriage to Miss Parker, and a marriage license was obtained on January 2, 1974. The marriage was scheduled for the end of January, but on January 7th, petitioner told Miss Parker that he was going out of town on business. She neither saw him again, nor heard from him until trial. The approximately two thousand dollars she loaned him was never returned, since all of his checks

submitted for repayment were returned for lack of funds (Tr. 94-101).

3. Petitioner contends that the introduction of that evidence denied him due process of law. This Court has repeatedly recognized, however, that trial judges have discretion to admit evidence of other crimes where, as here, such evidence relates to events close in time to those in the case on trial and is probative of a relevant issue, such as intent or motive. See, *e.g.*, *Spencer* v. *Texas*, 385 U.S. 554, 560-562; *Sherman* v. *United States*, 356 U.S. 369, 375; *Nye & Nissen* v. *United States*, 336 U.S. 613, 618. Rule 404(b), Fed. R. Evid., is merely a codification of the existing rule which this Court previously has approved.

The evidence of petitioner's other similar crimes was directly relevant to the question whether petitioner intended to defraud Amition, which was virtually the only contested issue. The evidence was properly admitted.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

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[3]Although petitioner asserts that this type of evidence weakens and shifts the government's burden of proof (Pet. 4-5), he does not explain how this evidence differs in any legally significant manner from all other relevant evidence.